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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-415

PORTLAND CEMENT ASSOCIATION, *Petitioner*

v.

RUSSELL E. TRAIN, Administrator, Environmental Protection Agency, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN MINING CONGRESS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

EDWARD A. MCCABE
JOHN G. DEGOOYER
JOHN H. SPELLMAN
HAMEL, PARK, MCCABE & SAUNDERS
1776 F Street, N.W.
Washington, D.C. 20006

LAURENCE P. SHERFY
1100 Ring Building
Washington, D.C. 20036

Counsel for the American Mining Congress

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BRIEF OF THE AMERICAN MINING CONGRESS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The American Mining Congress submits this brief as *amicus curiae* in support of the petitioner in this case. The consents of the Solicitor General and of counsel for petitioner to the filing of this brief have been obtained and are on file with the Clerk of this Court.

THE AMICUS AND ITS INTERESTS

The American Mining Congress is a national trade association founded in 1897, whose membership consists of hundreds of companies that produce most of the Nation's ferrous and non-ferrous metals, coal, industrial and agricultural minerals, and cement. Its membership also includes more than 200 companies that manufacture mining and mineral processing equipment and supplies, as well as financial institutions with a business interest in the mining industry.

The importance of mining to the United States cannot be overstated. Mineral substances and the products derived from them form the material foundation of our society; all Americans are totally dependent upon these products not only for their standard of living, but also for their survival. Minerals and metals are woven into every pattern of our economy and technology, and many of them are vital to national security. The critical importance of mining to the United States has been specifically recognized by Congress in the Mining and Minerals Policy Act of 1970, 84 Stat. 1876, and its legislative history. The significance of mining is also apparent from its effect on our economy. Although actual mineral production is slightly less than 3 percent of the U. S. gross national product, mining has a direct impact on 40 percent of the GNP and an indirect impact on 75 percent of the GNP.[1]

As the spokesman for the mining industry in the United States, the American Mining Congress has a

[1] Data as of 1969. See, Statement of Andrew Fletcher, *Hearings before the Subcommittee on Minerals, Materials, and Fuels of the Senate Committee on Interior and Insular Affairs,* 91st Cong., 1st Sess. 33 (1969).

legitimate interest in any governmental or other action affecting that industry. The decision below is one such action. While the decision specifically involves the cement industry, many of the issues presented by this case will affect every industry within the reach of the Clean Air Act—among them virtually every member of the American Mining Congress. Thus, each member of the American Mining Congress has a substantial interest in the ultimate decision in this case, and the American Mining Congress has accordingly been authorized to submit this brief in support of the petition for certiorari.

ARGUMENT

The American Mining Congress supports petitioner's position that a comparative cost-benefit analysis should have been employed by the Environmental Protection Agency as a part of its establishment of new stationary source emission standards for the cement industry under Section 111(a)(1) of the Clean Air Act.[2] The EPA Administrator squarely rejected the cost-benefit approach for establishing standards under the Act and the United States Court of Appeals erred in upholding that rejection. The failure of the court below—the only court empowered to review this type of EPA determination—to recognize the need for cost-benefit analysis is a significant error which will have a far-reaching impact throughout the industry and a detrimental effect on the National economy. Conse-

[2] Section 111(a)(1) of the Clean Air Act (42 U.S.C. § 1857c-6(a)(1)) provides: "The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which *(taking into account the cost of achieving such reduction)* the Administrator determines has been adequately demonstrated." [Emphasis added.]

quently, it is important that this court grant certiorari and correct the error below.

1. Congress clearly stated that one of its purposes in enacting the Clean Air Act was "to protect and enhance the quality of the Nation's air resources so as to promote public health and welfare and the productive capacity of its population."[3] This statement of purpose reveals an equal concern for (1) public health and welfare and (2) the economic well-being and productive capacity of the nation. Furthermore, Section 111(a)(1) of the Act requires the Administrator to "take into account the cost of achieving . . . [emission] reduction" in determining a new source emission standard. Reading this specific provision in light of the Act's general purpose, the only meaningful interpretation is that the Congress intended that these environmental standards be developed with a view towards balancing the economic cost of controls with the pollution reduction to be achieved—in short, a cost-benefit approach.[4]

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[3] 42 U.S.C. § 1857(b)(1).

[4] The legislative history of the statute also shows congressional recognition of the fact that the Act is both an economic measure and an air pollution measure. In the floor debates before passage of the 1970 amendments to the Act, Senators Jennings Randolph and Edmund Muskie stated the following:

> "Mr. RANDOLPH: . . . I know at times on the subcommittee and on the committee we have talked about the economics of this legislation as well as the health standards of the legislation, and I know that the Senator from Maine has been one of those who have recognized that this legislation is both an economic measure and air pollution measure. . . .
>
> "Mr. MUSKIE: The Senator is correct."
>
> (116 Cong. Rec. 42392, December 18, 1970).

It should also be noted that a proposal by Congressman Ryan of New York to impose the most advanced environmental controls upon industry regardless of the economic consequences was rejected. 116 Cong. Rec. 19242-43, June 10, 1970.

Certainly, Congress realized that industry would be required to spend money to meet new environmnetal standards. Although these expenditures represent an economic drain on the capital resources of industry and include funds that could otherwise be invested in economic growth, Congress concluded that the public benefits to be derived from cleaner air justified certain expenditures to be made to the extent that improvement in air quality was reasonably related to the invest-

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Also the National Environmental Policy Act (NEPA) requires that the Clean Air Act be read in such a way as to include a consideration of economic factors. The United States Court of Appeals for the District of Columbia Circuit has stated that the Clean Air Act be read in *pari materia* with NEPA. *Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375, 380 n. 17 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). While the EPA is admittedly not obligated to file a formal impact statement under the NEPA requirements, it must nevertheless prepare a "functional equivalent," (*Environmental Defense Fund* v. *E. P. A.*, 489 F.2d 1247, 1256 (D.C. Cir. 1973)) in which the economic and technical considerations are important. (42 U.S.C. § 4332(2)(B). *See, e.g., Sierra Club* v. *Froehlke*, 359 F. Supp. 1289, 1363-64 (S.D. Texas 1973)). The EPA has evaluated the possible necessity of compliance with NEPA cost analysis requirement. In February 1973, an EPA Task Force Report entitled "Application of NEPA to EPA's Environmental Regulatory Activities," stated at page 57 that "[f]ull compliance [with NEPA] might necessitate a balancing of costs and benefits to the standards being considered." We think that such a cost benefit analysis is required. In addition to the agency's interpretation of the NEPA requirement, the Council on Environmental Quality (CEQ), established under the NEPA has formulated standards requiring that the proper method for obtaining different levels of environmental quality is to weigh the benefits against the costs. *Environmental Quality*, 1971, at 119 (U.S.G.P.O.) Thus it can be seen that the CEQ and to some extent EPA itself have recognized that the NEPA standards reinforce the language of the Clean Air Act in requiring a balancing of economic costs against the benefits derived in implementing environmental protection legislation.

ment. Congress did not, however, contemplate the expenditure of large sums to achieve negligible results, at least where there is no overriding and compelling danger to public health and safety involved.[5] Congress intended that the EPA give close scrutiny to the cost of implementing EPA emission controls—scrutiny of the type provided by cost-benefit analysis.

2. In its reply to the court below the EPA improperly rejected the cost-benefit method of analysis.[6] The agency also stated that it would seek to obtain the lowest emission level feasible unless the costs were so great that the industry could not bear the cost and survive. Nowhere does the statute dictate such an extreme and unrealistic approach. Nor does the statute give the Administrator the discretion to impose such an approach on industry and thereby effectively shift to

[5] There is no such contention in this case. The standard here in issue involves only non-toxic particulate matter which is not inherently deleterious to human existence.

[6] The EPA states: "We believe that Congress intended § 111 to be used to establish emission limitations which are the lowest that can be achieved by that industry. Where the cost of meeting such standards would be so great that the industry could not bear the costs and survive, such standards could not be implemented by the industry regardless of technological feasibility. There are also cases where a reduction in emissions that would be achieved by a particular control technique would be so grossly disproportionate to the cost of the control technique that it would not be required. However, these determinations are necessarily judgmental and are left specifically to the Administrator in § 111. EPA does not believe that cost-benefit analysis can be established for standards under § 111 nor does it believe that Congress intended that standards be established or justified on the basis of such an analysis." EPA response on remand ordered by United States Court of Appeals for the District of Columbia Circuit in *Portland Cement Association* v. *Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973).

industry the burden of demonstrating that the requirements of section 111 have been met.[7]

The EPA did recognize, however, that "[t]here are also cases where a reduction in emissions that would be achieved by a particular control technique would be so *grossly disproportionate* to the cost of the control technique that it would not be required." [Emphasis added.][8] We fail to see how such a determination is to be made if not under some type of cost-benefit analysis. It would be necessary to measure the costs against the benefits to determine when the "grossly disproportionate" level had been reached. Thus, the agency itself has recognized that such determinations are required by the statute, but the Administrator in this case has refused to give effect to this requirement in any meaningful way by employing an actual cost-benefit analysis as a basis for establishing the emission standards for the cement industry. In this case, the EPA merely rejected[9] petitioner's cost-benefit analysis which

[7] EPA has stated in the most conclusory terms that its standard will not drive the cement industry out of business and will not impair the competitive position of cement vis-a-vis other structural materials. EPA reaches this conclusion by simply asserting that any increased cost incurred by the industry in reaching the level of particulate matter specified in the standard can be passed through to customers and that this pass-through (increase in price) will not cause cement consumers to turn away from cement in favor of some other structural material. We think the EPA thus overreaches when it purports to inject itself into the competitive marketplace and justify a standard based on *its* view of what the industry can or should do as to the price of its products.

[8] EPA response on remand ordered by United States Court of Appeals for the District of Columbia in *Portland Cement Association* v. *Ruckelshaus,* 486 F.2d 375 (D.C. Cir. 1973).

[9] In footnote 4 of the lower court opinion, the court erroneously found that this rejection was made "rationally." Petition, p. A-4 n. 4.

showed the regulation would result in a cost increase of nearly twenty percent in order to achieve an emission reduction of less than two-tenths of one percent, a cost effectiveness ratio of more than 100 to 1.[10] It is difficult to imagine a more dramatic example of gross disproportion between the emission reduction sought to be imposed by EPA, and its cost.[11]

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[10] In its response to the circuit court, the EPA also concluded that "relating the cost of control to the benefits of control at least at this time is a practical impossibility." It reached this conclusion because it found each emission source had its own environmental surroundings which materially influenced the effect of emission controls for that source. Certainly, this problem is not dispositive of the legal question of statutory interpretation. Once this court properly interprets the statutory requirement under the Clean Air Act, it will be necessary to devise an efficient method for adequately comparing the costs to the industry with the degree of improvement in air quality.

[11] The record below discloses that, in cement plants using precipitators, each precipitator removes 70% of the particulate matter in the exhaust gases it treats. Petitioner asserts that the EPA standard requires six such precipitators, all having the same approximate cost. On this basis, rough calculations of cost/efficiency (benefit) ratios can be made (percentage figures rounded to nearest hundredth):

(A)	(B)	(C)	(D)	(E)	(F)
Precipitator	Percent Increase in Cost	Particulate Removed by Each Precipitator (as a % of total)	Total Particulate Removed (as a % of total)	Percent Increase in Efficiency	Ratio of Increase in Cost to Increase in Efficiency (Col. B + Col. E)
1	—	70.00%	70.00%	—	—
2	100.00%	21.00%	91.00%	30.00%	3 to 1
3	50.00%	6.30%	97.30%	6.92%	7 to 1
4	33.33%	1.89%	99.19%	1.94%	17 to 1
5	25.00%	0.57%	99.76%	0.57%	44 to 1
6	20.00%	0.17%	99.93%	0.17%	118 to 1

CONCLUSION

If the rejection by EPA of a cost-benefit analysis of new source emission standards, as embodied in the decision of the court below, is permitted to stand, vast expenditures may be imposed on all segments of basic industry in this country, including the members of the American Mining Congress, which are out of all reasonable proportion to the benefits to be achieved. The enormous and widespread impact of the error committed by the court below emphasizes the importance of the question of federal law here involved—a question which has not heretofore, but manifestly should be, settled by this Court.[12] The petition for writ of certiorari should therefore be granted.

Respectfully submitted,

EDWARD A. MCCABE
JOHN G. DEGOOYER
JOHN H. SPELLMAN
HAMEL, PARK, MCCABE & SAUNDERS
1776 F Street, N.W.
Washington, D.C. 20006

LAURENCE P. SHERFY
1100 Ring Building
Washington, D.C. 20036

Counsel for the
American Mining Congress

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[12] This Court has recently recognized the importance of economic considerations in the environmental area through its grant of certiorari in *Union Electric Co.* v. *EPA* (No. 74-1542), *cert. granted,* October 6, 1975. That case, however, deals with economic considerations under Section 110 of the Act and will not clarify the extent of the EPA's obligations under Section 111—an issue squarely presented here.